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No. 79-1268

PATRICIA HARRIS, SECRETARY
OF HEALTH, EDUCATION, AND WELFARE,

Appellant,

—v.—

CORA MCRAE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AMICI CURIAE
of
National Organiation for Women, Americans for Democratic Action, Coalition of Labor Union Women, National Abortion Rights Action League. National Council of Jewish Women, National Women's Political Caucus, New York City Coalition of Labor Union Women, Women's Action Alliance, Women's Equity Action League Educational and Legal Fund, Women's Legal Defense Fund, American Association of University Women, National Women's Political Caucus.

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I N D E X

	Page
Table of Authorities.....	iv
Interest of Amici.....	1
Statement of the Case.....	3
Summary of Argument.....	5
Argument:	
I. The denial of Medicaid funding for medically necessary abortions intrudes on fundamental liberties of indigent women.....	10
A. When the government provides funds for childbirth and all medically necessary services but not for the alternative of medically necessary abortion, the proffered benefit impermissibly intrudes on indigent women's interest in their reproductive health.....	10
1. Denying Medicaid funding for medically necessary abortions has the intended effect of compelling indigent women to continue pregnancies injurious to their health.....	12
2. The denial of Medicaid assistance for medically necessary abortions im-	

Argument--Continued

Page

permissibly interferes with the woman's fundamental interest in health. 23

B. The denial of Medicaid funding for medically necessary abortions constitutes an unwarranted encroachment upon the constitutionally protected freedom to make choices surrounding the family and the home..... 28

C. The refusal to fund medically necessary abortions constitutes an unwarranted intrusion into the constitutionally protected realm of conscientious liberty..... 37

II. The plight of indigent women denied medically necessary abortions is exacerbated by the pervasive sex discrimination that impacts especially hard on women in poverty..... 44

A. Indigent women, the victims of the Hyde Amendment's restrictions on medically necessary abortions, are those most burdened by sex discrimination in employment..... 46

B. Indigent women, the victims of restrictions on medically necessary abortions and of sex discrimination in the

Argument--Continued

Page

labor force, are also those most burdened by sex discrimination in education and job training programs..... 57

III. The challenged statute does not withstand constitutional scrutiny..... 68

A. Strict scrutiny is required where, as here, the denial of Medicaid funding for medically necessary abortions impermissibly inhibits and penalizes the indigent woman who chooses to exercise her constitutionally protected right to terminate her pregnancy..... 68

B. Serving no legitimate interest whatsoever, the challenged restriction on Medicaid funding of medically necessary abortions fails both the strict scrutiny and minimum rationality tests..... 71

Conclusion..... 76

TABLE OF AUTHORITIES

Cases: Page

Beal v. Doe, 432 U.S. 438.....33

Budzinski v. Commonwealth of Pennsylvania Dep't of Public Welfare, No. 2349 C.D. (1977) 66

California Brewers Ass'n v. Bryant, 48 U.S.L.W. 4156 (1980).....55

Canterbury v. Spence, 464 F.2d 772 cert. denied, 409 U.S. 1064.....26

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Colautti v. Franklin, 439 U.S. 379..... 15,23,25,74

Connecticut v. Menillo, 423 U.S. 9..23,25

Dandridge v. Williams, 379 U.S. 471....31

DeLaCruz v. Tormey, 582 F.2d 45, cert. denied, 99 S.Ct. 2416.....66

Doe v. Bolton, 410 U.S. 179.....15

Doe v. Percy, 476 F.Supp. 324.....25

Eisenstadt v. Baird, 405 U.S. 438...10,37

Frontiero v. Richardson, 411 U.S. 677.....70

Cases: Page

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Jacobson v. Massachusetts, 197 U.S. 11.....26

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United States Constitution:

First Amendment.....4,43

Constitution and Statutes: Page

United States Constitution:

Fifth Amendment.....4,43

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Pub. Law 96-123, Section 109, Nov. 20, 1979, 93 Stat. 925.....4

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INTEREST OF AMICI

This brief is filed on behalf of the National Organization for Women, Americans for Democratic Action, American Association of University Women, Coalition of Labor Union Women, National Abortion Rights Action League, National Council of Jewish Women, National Women's Political Caucus, New York City Coalition of Labor Union Women, Women's Action Alliance, Women's Equity Action League Educational and Legal Fund, and the Women's Legal Defense Fund, with the written consent of the parties as provided in Rule 42 of this Court.

These organizations share a belief that every woman has a fundamental right to choose to terminate her pregnancy by abortion, guaranteed by her constitutional rights of privacy and religious freedom. Amici also share the conviction that the federal statute challenged in this case

impermissibly impinges upon the fundamental interest of all women in reproductive choice by effectively nullifying this constitutional right for indigent women. By excluding medically necessary abortions from an otherwise comprehensive health care program for the poor, the Hyde Amendment singles out and denies medical treatment to indigent women whose physicians have prescribed abortion as necessary to preserve and protect their health. The statute deliberately and purposefully denies poor women reproductive freedom, jeopardizing not only their health, but their lives, family stability, employment and education.

STATEMENT OF THE CASE

At issue in this case is whether the government can, consistent with our Constitution, subvert the reproductive choice of indigent women by denying them medically necessary care for health threatening pregnancies. The court below declared unconstitutional the challenged federal law, popularly known as the Hyde Amendment, which virtually eliminates federal funding for medically necessary abortions. The Hyde Amendment restricts the availability of assistance payments for medically necessary abortions under the "Medicaid" program established by the Title XIX of the Social Security Act, as amended, to "furnish medical assistance [to eligible persons] to meet the costs of necessary medical services." 42 U.S.C. §1396. Through this program, the federal government provides financial assistance for the medical care of needy individuals to states choosing to comply with the requirements of the federal statutory scheme.

First enacted as a rider to the 1977 fiscal year appropriation act for the Department of Health, Education and Welfare, the Hyde Amendment prohibits the expenditure of

federal Medicaid funds for abortions except in narrowly defined circumstances. The version of the Hyde Amendment in effect when the district court issued its opinion below allowed financial assistance for abortions only where the woman's life would be endangered if the pregnancy were carried to term, or the pregnant woman is the victim of reported rape or incest. Pub.L.No.96-123, §109,93 Stat. 925,926 (1979).

On January 15, 1980, the U.S. District Court for the Eastern District of New York held the challenged funding restriction unconstitutionally interferes with the pregnant woman's ability to terminate a health-threatening pregnancy, in violation of the First and Fifth Amendments, and enjoined enforcement of the Hyde Amendment. The United States government seeks a reversal of this judgment.

SUMMARY OF ARGUMENT

I

The Hyde Amendment singles out and eliminates almost all abortion procedures from services funded under an otherwise comprehensive program of health care benfits for the poor. The purpose and effect of this exclusionary funding scheme is to induce indigent women to carry unwanted pregnancies to term. The government succeeds in subverting the reproductive choice of indigent women and inducing them to continue pregnancies injurious to their health because the women lack feasible alternatives. This incursion into the health interest, recognized in the abortion context and more generally, impermissibly interferes with the indigent woman's core right to preserve her bodily integrity.

The indigent woman denied public funds to pay for a medically necessary abortion faces a range of grim alternatives, each of which has profound consequences for her existing family. In choosing to deny these funds, the government seeks to encourage the indigent woman with a health-

threatening pregnancy not only to bear additional children, but also to sacrifice her health and her family's well-being. In so doing the government intrudes on fundamental choices within the constitutionally protected sphere of family relationships in a manner contrary to deeply rooted traditions.

The Hyde Amendment unconstitutionally burdens a woman's conscientious decision to terminate a health-threatening pregnancy. Whether made in accordance with formal religious teachings or deeply held ethical and moral convictions, the decision is of conscientious magnitude and entitled to constitutional protection. To insist that a woman making this conscientious decision forego otherwise available medical benefits impermissibly invades a constitutionally protected realm.

II

Withholding government funds for health care from a pregnant indigent woman for whom abortion is medically necessary interferes with her ability to fully participate in our society. Her opportunities to

escape poverty through employment, education and job training, already limited because she is poor, are further restricted because she is a woman. Institutionalized sex discrimination in our society confines women to low-status, low-paying jobs, and to limited education and job training opportunities. The unequal opportunities open to poor women are evident in the general labor force, in federal job placement and job training programs, and in the military.

Denying the indigent woman the means to terminate a health-threatening pregnancy may impair her employment possibilities or preclude work entirely because of the health injury she suffers. If her health is restored, the lack of child care options in our society poses serious problems for the woman who must work for the economic survival of herself and her family. It also presents an obstacle to her educational and job training opportunities.

The sex bias that pervades educational institutions and job training programs reinforce the patterns of job segregation

and wage differentials found in the labor market. Coerced childbearing has a particularly devastating impact on the educational opportunities of teenagers. Having control over reproduction will not erase the many burdens faced by the indigent woman confronting poverty and sex bias. But by denying her the means to terminate a health-threatening pregnancy, the government has rendered illusory its efforts to combat these burdens.

III

Several interrelated factors require the Court to subject the challenged prohibition on funding medically necessary abortions to critical examination: the health damage inflicted on those making a disfavored reproductive choice; the privacy interest in decisions concerning reproductive and family matters; the liberty interest in making a conscientious decision to terminate a pregnancy for medical reasons; and finally, the powerless, disadvantaged and starkly defined--100% female and 100% poor--class of individuals affected by the prohibition. Taken singly, each of these factors compels critical review by

the Court. Together, they require that the Hyde Amendment be subjected to a strict standard of constitutional scrutiny.

No compelling or other state interest justifies the classification drawn by the Hyde Amendment. Fiscal interests are not only insufficient as a matter of law; they are illusory in fact. Nor does the challenged funding restriction protect maternal health. The only interest the Hyde Amendment arguably promotes is protection of potential life. Yet, as Roe v. Wade, 410 U.S.113 (1973), and its progeny make clear, this government interest is at no time great enough to outweigh the woman's interest in her health. The Court's decision in Maher v. Roe, 432 U.S.464 (1977), does not support a provision denying funds for medically necessary abortions. The Hyde Amendment serves no legitimate interest, let alone a compelling one. It cannot survive constitutional review.

ARGUMENT

I

THE DENIAL OF MEDICAID FUNDING FOR MEDICALLY NECESSARY ABORTIONS INTRUDES ON FUNDAMENTAL LIBERTIES OF INDIGENT WOMEN.

A. When the Government Provides Funds for Childbirth and All Medically Necessary Services But Not For the Alternative of Medically Necessary Abortion, the Proffered Benefit Impermissibly Intrudes on Indigent Women's Interest in Their Reproductive Health.

The right of every individual to be free from governmental interference in the exercise of personal procreative decisions has been long recognized as a fundamental liberty protected by the constitutional right of privacy. See, e.g., Carey v. Population Services International, 431 U.S.678 (1977); Eisenstadt v. Baird, 405 U.S.438 (1972); Griswold v. Connecticut, 381 U.S.479 (1965). The Court has articulated the principle that this constitutional right to privacy is "broad enough to encompass a woman's

decision whether or not to terminate her pregnancy." Roe v. Wade, 410 U.S.113, 153 (1973).

The Hyde Amendment challenged in this case intrudes upon the exercise of this right. It singles out and eliminates virtually all abortion procedures from those services funded under an otherwise comprehensive program of health care benefits for the poor.[1/] The purpose and effect

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1/ Title XIX of the Social Security Act, as amended, establishes the Medicaid program to "furnish medical assistance [to eligible persons] to meet the costs of necessary medical services." 42 U.S.C. §1396. States choosing to participate in this program must provide basic hospital and physician services for the "categorically needy," i.e., all persons eligible for welfare under federal categorical assistance programs. 42 U.S.C. §§1396a(a)(10), 1396a(a)(13)(C), 1396d(a). Participating states have the option of providing Medicaid payments to others who meet categorical requirements for federal assistance but are not eligible for welfare. The federal government has conceded that but for the adoption of the Hyde Amendment, participating states would be obligated to provide medically necessary abortions to Medicaid eligible persons. Brief for the United States at 43n.23, United States of America v. Zbaraz, No. 79-491.

of this exclusionary funding scheme is to induce indigent women to carry unwanted pregnancies to term. This restriction impermissibly subjects poor women to health-threatening and, at times, life-threatening risk.

1. Denying Medicaid funding for medically necessary abortions has the intended effect of compelling indigent women to continue pregnancies injurious to their health.

Once pregnant, a woman has two alternatives: to continue or terminate her pregnancy. The Court has recognized that the woman's fundamental interest in personal privacy protects this procreative choice. Roe v. Wade, 410 U.S.113 (1973). However, in reality, only those women able to pay the cost of their medical care can effectuate their constitutional right to choose between these two alternatives free from state interference.

As the Supreme Court recognized in Maher v. Roe, 432 U.S.464,474 (1977), by funding the childbirth alternative for the Medicaid-dependent woman and excluding the abortion alternative, the state deliberately influences the woman's reproductive choice. See Reproductive Health Services v. Freeman, F.2d , No. 79-1275, slip op. at 18-19 (8th Cir. 1980). Indeed, the federal government has acted to deny funds for almost all abortions precisely because it wishes to subvert the reproductive choice of women seeking to terminate their pregnancies.[2/] See McRae v. Harris, F.Supp. , No. 76C 1805, slip op. at 293,297 (E.D.N.Y. Jan. 15, 1980).

2/ In inducing women to continue their health-threatening pregnancies, the Hyde Amendment disregards the voluntary or involuntary nature of the intercourse that created the pregnancy, which itself can be a health-threatening factor. Where the pregnancy results from rape or incest, funding is limited to those cases which meet a strict and unrealistic sixty-day reporting requirement. See McRae v. Harris, slip op. at 151, 155, 157.

Similarly disregarded are the women who, determined to avoid pregnancy by the regular use of contraceptives, often prescribed by the physician

Like the provision before the Court in Maher v. Roe, 432 U.S.464 (1977), the denial of funding for medically necessary abortions undoubtedly will have its intended effect upon some indigent women: lacking feasible alternatives, they will be forced to continue their unwanted pregnancies. And, for some, the unwilling continuation of the

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[footnote continued]
for health reasons, nevertheless become pregnant. No contraceptive is guaranteed--the failure rates range from 6% with the pill, and 12% with the I.U.D. to 33% with rhythm. Ryder, "Contraceptive Failure in the United States," 5 Family Planning Perspectives 133 (1973) (expressed as the percent failure among users over one year). The cumulative failure rate over a woman's childbearing years is of course much greater. Older women, often unaware of the duration of fertility beyond the onset of menopause, may also become pregnant unintentionally. Likewise, teenagers, ignorant of or misinformed as to the consequences of sexual intercourse or ignorant of or unable to obtain contraceptives, may fail to practice contraception regularly. For both of these groups health factors are especially important.

life-endangering pregnancy, despite the risks,[3/] will result in normal childbirth.

3/ All pregnancies pose health risks. These risks range from injury from falls occasioned by the unusual weight distribution of advancing pregnancy to death from hemorrhage, pulminary embolism and toxemia, among other causes. McRae v. Harris, slip op. at 93,94. In fact, the risk of death from childbirth is significantly greater than the risk of death from abortion. The Court in Roe v. Wade, 410 U.S.113 (1973), cited medical data as evidence that maternal mortality rates for early abortions "appear to be as low as or lower than the rates for normal childbirth" and concluded that in early abortion, maternal mortality in abortion may be less than mortality in normal childbirth. Id. at 149,163 (emphasis added). More recent statistics make clear that abortion is substantially safer than childbirth. McRae v. Harris, slip op. at 90. Mortality in childbirth for white women in 1974 was 10 per 100,000 live births; mortality in abortion was 0.5. For "black and other" women, mortality in childbirth was 35.1 per 100,000 live births; in abortion 2.4. Id.

Physicians nevertheless distinguish between pregnancies where abortion is medically indicated and those where it is not. The Court has shown reluctance to interfere in such medical judgments. Cf. Colautti v. Franklin, 439 U.S.379,401 (1979); Roe v. Wade, 410 U.S. at 166; Doe v. Bolton, 410 U.S.179,192 (1973).

However, unlike the situation in Maher,[4] it is clear that other women, unable to obtain abortions their physicians consider medically necessary to restore and preserve their physical and mental health, are certain to endure health-impairing pregnancies.[5]

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[4] In Maher, the Court emphasized repeatedly that it was dealing with nontherapeutic abortions: "[W]e must decide whether the Constitution requires a participating state to pay for nontherapeutic abortions" 432 U.S. at 466 (emphasis added); "[The rationality test] requires that the distinction drawn between childbirth and nontherapeutic abortions...be 'rationally related' to a 'constitutionally permissible' purpose" Id. at 478 (emphasis added); "I do not read any decision of this Court as requiring a state to finance a nontherapeutic abortion." Id. at 481 (Burger, C.J., concurring) (emphasis added).

[5] The health problem is particularly acute for indigent pregnant teenagers who suffer from higher maternal mortality rates and are more likely to suffer health complications from pregnancy. See McRae v. Harris, slip op. at 137-38; Alan Guttmacher Institute, 11 Million Teenagers 23 (1976).

Thus, women will be subjected to conditions which, while falling short of the immediately life-threatening, will jeopardize their health.[6] In some cases, the health-threatening conditions will reach life-endangering proportions late in the pregnancy.[7]

In the case of medically necessary abortions, it is the state's failure to allocate funds no less than the woman's indigency which interferes with her right to terminate her pregnancy. The introduction of a massive system of federal funding has irrevocably altered the mechanisms by which this country provides health care for the poor. The government has now assumed the role previously played by other sources, such as charitable services,

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[6] These conditions include cancer, myoma of the uterus, urinary tract infections, anemia, malnutrition, and obesity. McRae v. Harris, slip op. at 101-10. When there are preexisting conditions like diabetes, heart disease, chronic hypertension, various mental disorders, and a host of other common health problems, the physical stress of pregnancy increases the severity of the condition.

[7] McRae v. Harris, slip op. at 91-96.

which provided some medical care in the past but were certainly inadequate in light of the need for Medicaid. Such sources cannot now possibly fill the chasm created by the statutory exclusion of one service, abortion, from an otherwise comprehensive government health care program.[8/]

8/ As a result of the Medicaid program and its predecessors, both hospitals and physicians reduced their own private contributions to medical care for the indigent. See Stevens and Stevens, "Medicaid: Anatomy of A Dilemma," 35 Law & Contemporary Problems 348, 355n.24 (1970).

The irreversible nature of such trends is apparent from the experience of New York City in 1968 when cutbacks in the state Medicaid program went into effect:

> With the coming of Medicaid, much of the former private subsidy of welfare cases had been replaced by public subsidy; Medicaid had in large part eliminated "charity." The voluntary and proprietary hospitals and, for that matter, private practitioners in the health fields, were not prepared simply to revert to the preexisting situation. The voluntary hospitals, in particular, could not afford it. It was by then illegal, moreover, for welfare workers to press a recipient's relatives to contribute. There was no adequate resource to pick up the services and patients that Medicaid dropped. All in all, the medical care available to the many thousands of poor in New York City who were no longer eligible for assistance was worse in 1968 than it was before Medicaid was enacted.

Id. at 388.

For those women for whom the only source of medical care is Medicaid, access to abortion is either nonexistent or physically dangerous. By definition, Medicaid recipients are the poorest in the nation. Ninety percent of the Medicaid eligible women of reproductive age in the United States receive Aid to Families with Dependent Children (AFDC).[9/] The average monthly AFDC allocation for an entire family (usually a mother and two children) is $241;[10/] the average cost of an abortion in the United States is $285,[11/] some $44 more than the entire AFDC monthly allocation. The income level of indigent women is at that of subsistence; there is simply no money available to pay for an abortion. Where the physician cannot afford to work with no charge, and the woman cannot afford to pay, safe medical abortion is not

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9/ Alan Guttmacher Institute, Abortions and The Poor: Private Morality, Public Responsibility 8 (1979).

10/ Id. at 27.

11/ Id.

a realistic alternative.[12] See Singleton v. Wulff, 428 U.S.106,118-19n.7 (1976).

Unable to raise the money for a legal abortion, some women will turn in desperation to less costly and less safe illegal abortions.[13] In 1977, for the first time since 1972, reported deaths due to illegal abortions increased.[14] Still other women will risk their lives by attempting one of

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[12] Some indigent women will attempt to gather the resources necessary to pay for an abortion by sacrificing other life necessities--food, shelter, clothing. In their quest for funds to pay for an abortion, they will lose time, thereby increasing the risks from the abortion. The Center for Disease Control has documented the direct connection between the restriction of public funds and the delay in performance of abortion. U.S. Dep't of Health, Education and Welfare, Center for Disease Control, Abortion Surveillance Annual Summary 1977 1 (1979).

[13] Id. at 12-14.

[14] Id. at 1. See Petitti and Cates, "Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age," 67 Am. J. Pub. Health, 860, 861 (1977).

the numerous dangerous methods to self-abort.[15] Still others, believing their options very narrow, will see sterilization as the only accessible means of birth control and will, therefore, "select" to be irreversibly sterilized.[16]

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[15] "Among the non-medical procedures used for inducing abortion," according to the National Academy of Sciences Institute of Medicine, "are eating or drinking quinine or other drugs, introduction of chemicals into the vagina, and mechanical methods such as inserting blunt or sharp instruments into the uterus through the vagina. The drugs quite often lead to poisoning or vomiting so intense that it results in dehydration and eventual death unless fluid replacement compensates the loss. Inserting chemicals or instruments in the vagina or uterus can lead to: (1) infection; (2) injury to the membranes of the vagina; (3) perforation of the uterus with the possibility of injury to other organs in the abdominal area; (4) bleeding due to retained fetal or placental tissue; and (5) air embolism." National Academy of Sciences Institute of Medicine, Legalized Abortion and Public Health 64 (1975).

[16] Sterilization is a medical procedure that permanently ends an individual's reproductive capacity. Although a legitimate decision when arrived at voluntarily, amici submit that the withdrawal of funds for medically necessary abortions creates an inherently coercive situation for poor women seeking to limit the size of their families. Indigent women dependent on government funded health programs are particularly vulnerable to such coercion. See Brief for National Lawyers Guild et al., Amici Curiae.

Given the absence of feasible alternatives to continuing a health-threatening pregnancy, it is not surprising that the court below found that the Hyde Amendment's funding restrictions impermissibly jeopardize the health of indigent women. McRae v. Harris, slip op. at 307-15. Clearly, the effect of the Hyde standard is to "increase substantially maternal morbidity and mortality among indigent pregnant women." Williams v. Zbaraz, 99 S.Ct. 2095,2099 (1979) (quoting the district court opinion in Zbaraz).

2. The denial of Medicaid assistance for medically necessary abortions impermissibly interferes with the woman's fundamental interest in health.

Funding schemes designed to induce women to sacrifice their health in order to promote the state's purported interest in encouraging childbirth constitute an unwarranted incursion into the health interest recognized both in the abortion context and more generally. Roe v. Wade, 410 U.S. 113 (1973), and its progeny exhibit an overriding concern with the woman's health. Indeed, concern for the woman's health is a major consideration in these cases, taking primacy over potential life. See, e.g., Colautti v. Franklin, 439 U.S. 379 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Connecticut v. Menillo, 423 U.S. 9 (1975).

In Roe v. Wade, the Court catalogued a broad range of health detriments to the woman caused by restricting access to abortion, 410 U.S. at 153, and placed the "compelling point" for the state's maternal health

interest at the end of the first trimester expressly because early abortions are relatively safe and a woman's right to privacy is paramount. Id. at 163. A similar concern for the woman's welfare prompted the court in Roe to permit state regulation for the preservation of maternal health after the first trimester. Id. at 163. Moreover, the pregnant woman's health is the only factor that overrides the state's interest in protecting fetal life after viability. Id. at 164-65. At this time the state may regulate and even prohibit some abortions; however, even after viability this broad power is subordinated to the woman's interest in her health. Id. at 164-65. Thus, even in the last trimester of pregnancy when the woman's right to privacy has been ruled to be the weakest, the state may not restrict access to abortion in a manner dangerous to the woman's health.

The Court's holding that the woman's interest in health cannot be overridden even in the last trimester has been characterized by one district court as:

> So explicit and pointed ... that it cannot be ignored or discounted when the question is whether the woman's freedom of choice is to be considered fundamental in the context of less drastic, even mild forms of intrusion.

Doe v. Percy, 476 F.Supp. 324, 333 (W.D. Wis. 1979).

Nor has the Court retreated from its clear concern for the woman's health. For example, in Connecticut v. Menillo, 423 U.S. 9 (1975), predicating its decision on safeguards for the woman's health, the Court ruled that Connecticut could, during all trimesters of pregnancy, prosecute non-physicians who performed abortions. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), Missouri's simple, straightforward informed consent requirement was upheld in view of its beneficial effect on the woman's mental health. Id. at 65-67. But at the same time the Court found Missouri's prohibition of saline abortion procedures unconstitutional because it forced the physician to use methods more dangerous to the woman's health. Id. at 78. And, in Colautti v. Franklin, 439 U.S. 379 (1979), the Court invalidated a criminal statute that failed to specify to whom the physician's

duty was paramount if a conflict arose -- the woman or the fetus.

The exclusion of medically necessary abortions from the Medicaid program constitutes not only an unwarranted interference with the overriding health interest of the woman recognized in the abortion context, it constitutes an impermissible interference with the woman's constitutional right "to seek to preserve one's health--without undue government influence." Reproductive Health Services v. Freeman, slip op. at 19 n.18. The right of "[e]very human being of adult years and sound mind...to determine what shall be done with his own body..." has been described as "fundamental in American jurisprudence." Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972), cert. den. 409 U.S. 1064 (1972).

Although certain interests may be overridden in the common good, the individual woman's right to preserve her bodily integrity represents a paramount interest with which the state lacks power to interfere. Thus, for example, in Jacobson v. Massachusetts, 197 U.S. 11 (1905), although upholding a

statutory vaccination requirement against a due process challenge, the Court made clear that judicial intervention is appropriate against vaccination, when, given the condition of a person's "health or body", vaccination would be "cruel and inhuman in the last degree." Id. at 39. Certainly indigent women confronting health-threatening pregnancies are in a condition of "health or body" where continuation of pregnancy would be "cruel and inhuman in the last degree." Judicial intervention is required to end the unwarranted intrusion into their bodily integrity resulting from the Medicaid funding restrictions challenged herein.

B. The Denial of Medicaid Funding for Medically Necessary Abortions Constitutes an Unwarranted Encroachment Upon the Constitutionally Protected Freedom to Make Choices Surrounding the Family and the Home.

The indigent woman denied the means to pay for a medically necessary abortion faces a range of grim alternatives, each of which has profound consequences for her life and her existing family. If she is to obtain a safe, legal abortion she must use the meager allowance available for her family's subsistence to pay for it.[17/] Already dangerously close to the margin, her family will thus be deprived of food, clothing or shelter.[18/]

Instead of subjecting her family to such immediate physical deprivation, the woman with a health condition her physician determines necessitates an abortion can turn to an illegal abortion -- one that is less costly,

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17/ See p.20 n.12, supra.

18/ See Women's Health Services, Inc. v. Maher, Civ. No. H-79-405, slip op. at 13n.9 (D. Conn. Jan. 7, 1980). The district court noted that in some cases patients were driven to fraud (using a relative's insurance policy) or theft to obtain funds to pay for a therapeutic abortion. Id.

non-professional and life endangering; attempt to induce abortion herself; or continue her health-threatening pregnancy to term. Each of these alternatives poses serious threats to the welfare and stability of her family. The mental or physical incapacity resulting from a dangerous, illicit abortion or a disabling pregnancy may deprive her children of her parental care. If she dies, the trauma of parental loss may affect her children's well-being permanently. The deprivation resulting from incapacity or death is particularly severe when the Medicaid woman is the sole head of the household.

Short of the extreme results -- the woman's disability or death -- continuing the pregnancy may nonetheless impose other severe deprivations on an indigent family. The woman may be without the physical or emotional energy, or the financial resources, to support the expansion of the family. If, for example, she gives birth to a child with a birth or congenital defect who requires constant care, she will be forced to concentrate her energies on the care of the baby to the detriment of other children or family members. Her energies may be so drained by the birth and new child care

responsibilities that she will be unable to provide the emotional support needed by her other children and family members. She may be forced to give up employment, thereby further limiting the financial resources available to the family. Future employment and educational opportunities will be seriously restricted for her, placing additional stress on her family.

Withholding government funding for therapeutic abortions compounds the desperate situation the indigent woman dependent on welfare faces in attempting to provide adequate care for her family. Basic AFDC grants are often only a fraction of the minimum amount a state has determined is needed for a family to subsist.[19] Maximum grants mean finite resources

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[19] Ohio for example, estimates the monthly basic needs for a family of four to be $431 but provides only $254. Georgia estimates the basic needs to be $246 but provides only $148. U.S. Comm'n on Civil Rights, Women Still in Poverty 46-47app. (July 1979).

available irrespective of family size.[20] Without control over family size, the entire family falls deeper and deeper into poverty with each additional member.

Housing presents a particular problem. Unless an indigent woman can plan additions to her family, she has no hope of surmounting monumental barriers to adequate housing.[21] Nationally, large housing units are in short

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[20] See generally, Dandridge v. Williams, 397 U.S. 471 (1970). Alaska, Kentucky and Oklahoma limit AFDC benefits regardless of family size. The state of Washington allows smaller increments per person for additional family members beyond seven. U.S. Dep't of Health, Education and Welfare, Compilation Base on Characteristics of State Plans for AFDC 61-62 (April 1978).

[21] Discriminatory "no children" policies are being uncovered nationwide. A California survey of five cities revealed that children are excluded in the majority of rental housing in every studied city except San Francisco where a local ordinance prohibits "adult only" housing. Ashford and Easton, The Extent and Effects of Discrimination Against Children in Rental Housing 6 (1979). It has been suggested that "adult only" policies may represent a direct attempt to exclude female-headed households, the households "which because of their limited income levels are most in need of apartment accommodations." Greene, Child Discrimination in Rental Housing 19 (Nov. 1979).

supply. In public housing long waiting lists for such units are well-known.[22]

Further, ceilings on housing allotments[23] limit resources available for shelter without regard to family size and irrespective of actual cost. In light of the harsh realities, compelling an indigent woman to continue her health-threatening pregnancy to term virtually assures her inability to meet the housing needs of her family.

In addition to the privations imposed on her family, the woman denied access to an abortion her health requires is forced to bear a child who begins life at a disadvantage. These children generally experience a higher incidence of illness and hospitalization, do not do as well in school as children of like intelligence, and have difficulty making friends with their peers.

22/ See U.S. Dep't of Housing and Urban Development, Women and Housing 87-88 (June 1975).

23/ Few states provide AFDC recipients shelter allotments in accordance with what the recipient actually pays. Mississippi, for example, provides a monthly $50 shelter maximum for a family of four. U.S. Comm'n on Civil Rights, Women Still in Poverty 47 app. (July 1979).

See Beal v. Doe, 432 U.S. 438, 456 (1977) (J. Marshall, dissenting); McRae v. Harris, slip op. at 126.

Children cannot flourish without love and support. Unwanted pregnancy and childbirth have been linked with an increased risk of child abuse. Id. at 129. Although child abuse occurs throughout the income scale, the problem is particularly acute for those of lower socio-economic levels where the never-ending pressures of financial burdens, health problems, low salaries or unemployment can create a situation in which the caretaker just loses control Id. at 129.

The pressures confronting poor women forced to continue health-threatening pregnancies all too often result in the destruction of the family unit.[24] Unable to

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24/ This is particularly true with teenage marriages, where there is a high probability of marital instability and divorce. See Alan Guttmacher Institute, 11 Million Teenagers 27 (1976); New York State Dep't of Social Services, Teenage Pregnancy in New York State: A Report to Governor Hugh L. Carey 4 (1978).

provide adequate care for her children, the woman may be forced to surrender them to foster care.[25] Once this surrender is made, it may be of long duration: the indigent woman attempting to obtain the return of her child often faces strenuous resistance from child welfare agencies that see the

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[25] As this Court has already noted, "voluntary" foster care placements "occur when physical or mental illness, economic problems, or other family crises make it impossible for natural parents, particularly single parents, to provide a stable home life for their children for some limited period." Smith v. Organization of Foster Families for Equality and Reform, 431 U.S.816,824 (1977). The Court also noted that according to experienced commentators, "typical parents in this situation might be...an unwed adolescent mother still too immature to rear a child, or a welfare mother confronted with hospitalization and therefore temporarily incapable of caring for her child." Id. at n.10. (citations omitted). See New York State Dep't of Social Services, Teenage Pregnancy in New York State: A Report to Governor Hugh L. Carey 4 (1978).

Adoption may not realistically exist as an option for teenagers. As the lower court found: "[i]nfants born to adolescents denied abortion are even less likely to be adopted because of their higher incidence of ill health and because minority infants are disproportionately represented among them." McRae v. Harris, slip op. at 146.

natural parents' poverty and lifestyle as prejudicial to the best interests of the child.[26]

In choosing to deny Medicaid funds for medically necessary abortions, the government seeks to encourage indigent women not only to bear children, but also to sacrifice their health and their family's well-being. In attempting to achieve such far-reaching consequences, the government invades a sphere of individual decision-making concerning home and family life which has enjoyed a long history of constitutional protection. For example, the government may not unnecessarily intrude on parents' educational decisions, Pierce v. Society of Sisters, 268 U.S.510 (1925); Meyer v. Nebraska, 262 U.S.390 (1923); dictate the composition of the nuclear family, Moore v. East Cleveland, 431 U.S.494 (1977) (plurality opinion); deprive parents of

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[26] Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. at 835-36.

their children's love and companionship without due process of law, Stanley v. Illinois, 405 U.S.645 (1972); or unduly limit marriage, Zablocki v. Redhail, 434 U.S.374 (1978); Loving v. Virginia, 388 U.S.1 (1967).

In the instant case, moreover, by inducing health detriment the government has intruded on fundamental choices within this protected sphere of family relationships in a manner which is contrary to deeply rooted traditions. Cf. Zablocki v. Redhail, 434 U.S. at 396 (Powell, J. concurring). Its action in singling out and refusing to fund this one medically necessary procedure is therefore impermissible and cannot be allowed to stand.

C. The Refusal to Fund Medically Necessary Abortions Constitutes an Unwarranted Intrusion Into the Constitutionally Protected Realm of Conscientious Liberty.

In exercising the awesome responsibility inherent in questions "so fundamentally affecting a person as the decision whether to bear or beget a child," Eisenstadt v. Baird, 405 U.S. 438,453 (1972), an indigent woman confronted with a health or life-threatening pregnancy faces a decision of religious magnitude. It is by necessity a decision of conscience or conviction whether or not its answer is guided by explicit religious teachings or by deeply held moral and ethical beliefs.

For some women, a conscientious decision guided by denominational teachings will require termination of the pregnancy.[27/]

[27/] Thus, for example, "in the Conservative and Reform Jewish teaching...the mother's welfare must always be the primary concern in pregnancy, the fetus is not a person, and...abortion is mandated to preserve the pregnant woman's health." McRae v. Harris, slip op. at 326-27.

Other denominations, without requiring abortion, recognize circumstances justifying abortion and call upon the woman to make a responsible personal decision.[28/]

Moreover, women who confront the procreative choice without formal religious teachings must nevertheless decide whether, particularly considering the threatened impairment of their health, they can in good conscience carry the unwanted pregnancy to term. The decision to become a parent is a difficult and awesome one, of conscientious dimension, in part because of the emotional and practical consequences of parenthood. The ties that bind the parent to the child, though not susceptible to easy description, "end only

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28/ For example, the American Baptist Church would consider "danger to the physical or mental health of the woman, evidence that the conceptus has a physical or mental defect, and conception in rape, incest or other felony as justifying abortion," McRae v. Harris, slip op. at 327. The United Methodist Church affirms the principle of responsible parenthood and recognizes threats posed by the pregnancy to the health of the woman and her family, and even the mental capability of the child, to be reasons for discontinuing the pregnancy. Id.

with the death of the parent."[29/]

The practical consequences of parenthood are equally profound, affecting not only the newborn; but also, as we have seen, the very survival of the existing family unit.[30/] Society merely confirms and reinforces the parent's own conscientious sense of responsibility by imposing on parents the legal

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29/ Benedek, "Parenting During the Life Cycle," in Parenthood: Its Psychology and Psychopathology 185 (Anthony and T. Benedek eds. 1970). Perhaps for this reason, the McRae court found "[a]doption, even if there were enough potential adopting parents, does not represent a humanly available alternative," even for adolescent mothers. McRae v. Harris, slip op. at 144-45.

The impact of parenthood is so great that at times it may even sever crucial emotional ties. A recent study found: "Although a small number of prospective grandparents accept the pregnancy easily, most do not. Initially anger appears to be the most common parental response. This anger may be strong enough that the daughter feels the necessity to leave her home." Osofsky and Osofsky, "Teenage Pregnancy, Psychosocial Considerations," 21 Clinical Obstetrics & Gynecology 1164-65 (1978).

30/ See Part IB supra.

obligation to support their children,[31] and by subjecting them to criminal-type proceedings for neglect of their parental duties.[32]

Given the devastating life-long implications of forced child-bearing, pregnancy presents the indigent woman with profound questions of life and death. Whether

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31/ See H. Clark, Domestic Relations 187-88 (1968); B. Brown, A. Freedman, H. Katz and A. Price, Women's Rights and the Law 145-56 (1977). As a practical matter, where parents are not living together, this obligation falls primarily on women. A United States Bureau of the Census study of women receiving child support showed that a large majority of divorced and separated women with children under 18 received no child support in 1975. Specifically, among such women who were divorced and had not remarried, 58% received no child support. Among remarried divorced women with children under 18 from their previous marriage, 74% received no child support. Among currently separated married women with children under 18, 82% received no child support. Among the never married mothers, 96% received no child support. Among all such mothers who received child support payments, 54.4% received less than $1500 per year for an average of two children. Roughly 31.7% of all the women receiving child support need public assistance. U.S. Dep't of Commerce, Bureau of the Census, Divorce, Child Custody and Child Support Table 8, p. 14 (June 1979).

32/ See H. Clark, Domestic Relations 200 (1968).

or not considered in the context of formal religious teachings, these questions are answered "disregarding elementary self-interest...in response to an inward mentor." United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943).[33] The decision whether or not to bring a child into the world is one which by definition involves the exercise of conscience. Certainly for a woman with a health-threatening pregnancy, her conscience or convictions may make abortion the only acceptable form of treatment.

33/ The need to afford theists and non-theists equal protection for their respective beliefs and to avoid unconstitutionality prompted the Court to construe the statutory military service exemption broadly to include "all those whose conscience, spurred by deeply held moral, ethical or religious beliefs, would give them no rest or peace if they allowed themselves to become the instrument of war," Welsh v. United States, 398 U.S. 333, 344 (1970). So too the need to afford an equal value to all faiths, and to decisions of conscience reached without guidance from formal religion, requires recognition of a broad right of conscience in regard to decisions affecting childbirth and abortion. See United States v. Seeger, 380 U.S. 163, 176 (1965).

Decisions in regard to abortion and childbirth are thus of conscientious and religious dimensions partaking of the realm of liberty protected by the First and Fourteenth Amendments. In the words of the district court below,

> A woman's conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights, nearly allied to her right to be, surely a part of the liberty protected by [the due process clause], doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment.

McRae v. Harris, slip op. at 328.

Legislative provisions like that challenged here which intervene in such protected decisions cannot stand consistent with our constitutional scheme. In the absence of a compelling state interest, funding programs that force a woman to choose between either following her conscientious decision, thereby forfeiting benefits, or abandoning her conscientious choice so as to obtain the benefits, impermissibly burden constitutional liberties. See Sherbert v. Verner, 374 U.S. 398, 403-04 (1963). When religious freedoms

are at stake, it makes no difference that the burden may be characterized as indirect.[34/]

For these reasons, amici urge this Court to hold, as did the district court below, that to deny necessary medical assistance for the lawful and medically necessary procedure of abortion is to violate the pregnant woman's First and Fifth Amendment rights. The irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision. McRae v. Harris, slip op. at 328.

34/ While the Court found in Maher v. Roe that the burden imposed by Medicaid restrictions on the funding of elective abortions was "indirect" and therefore not "undue" in the Fourteenth Amendment sense, the Court implicitly acknowledged that such burdens may be unconstitutional when First Amendment interests are at stake. 432 U.S. at 474-75 n.8.

II

THE PLIGHT OF INDIGENT WOMEN DENIED MEDICALLY NECESSARY ABORTIONS IS EXACERBATED BY THE PERVASIVE SEX DISCRIMINATION THAT IMPACTS ESPECIALLY HARD ON WOMEN IN POVERTY.

For the poor, the fundamental guarantee of reproductive rights is particularly critical. Their life situation may make the choice whether or not to have a child effectively determine whether poverty will continue unabated, whether a family will remain intact, whether they as individuals will even survive and ever hope to prosper.

Withholding government funds for medical care from the indigent woman who is pregnant and in need of an abortion to preserve her health interferes with her ability to fully participate in our society. By definition, she is dependent upon the Medicaid program because she is poor. Her opportunities to escape poverty through employment, education and job training are severely limited because of her poverty.

But the obstacles the indigent woman faces in the labor market and in seeking education and job training are not limited to those known by all poor people. They are compounded by those obstacles common to all women: the persistent, sex-based discrimination that still confines women to low-status, low-paying jobs, and to limited job training and education opportunities.[35/] For the indigent woman, the opportunities are fewer still.[36/] Her chances for these necessities, already limited because she is female, and further limited because she is poor, are virtually eliminated when she is denied the right to control her reproductive life and maintain control over her health.

35/ See generally, National Comm'n on the Observance of International Women's Year, The Spirit of Houston at 34-37, 42-48 (1978); U.S. Comm'n on Civil Rights, Social Indicators of Equality for Minorities and Women (1978); U.S. Dep't of Labor, 1975 Handbook on Women Workers (1975) [hereinafter cited as Handbook on Women Workers].

36/ See, e.g., U.S. Comm'n on Civil Rights, Women Still in Poverty (1979) [hereinafter cited as Women in Poverty].

A. Indigent Women, The Victims of The Hyde Amendment's Restrictions on Medically Necessary Abortions, Are Those Most Burdened by Sex Discrimination in Employment.

Employment opportunities and pay for indigent women continue to reflect the sex discrimination that has permeated our society. Occupational segregation and the wage gap between men and women are especially severe in employment situations most likely to be accessible to the poor. Where indigent women are able to secure employment, they face the high probability of being concentrated in low-skilled, low-paying, dead-end jobs.

Employed women are concentrated in a very limited number of occupations;[37] these are invariably the lowest paying occupations of all.[38] Even in the most gender-segregated

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37/ In 1973, more than two-fifths of all employed women were concentrated in only 10 occupations--secretary, retail trade salesworker, bookkeeper, private household worker, elementary school teacher, waitress, typist, cashier, sewer and stitcher and registered nurse. About three-fourths of all employed women were in only 57 occupations; in more than half of these, 75 percent or more of the employees were women. Handbook on Women Workers at 91-92. There is evidence that the occupational segregation of women is increasing. For example, in June 1978, 79 percent of all clerical workers were women, as compared to 62 percent in 1950. U.S. Dep't of Labor, Bureau of Labor Statistics, Employment in Perspective: Working Women (Report No. 544, 1978).

38/ The 1977 weekly wage for the job categories listed in note 37 supra, except elementary school teacher and registered nurse, ranged from $59 for private household workers to a high of $171 for sewers and stitchers. U.S. Dep't of Labor, Bureau of Labor Statistics, News: Trends in Weekly and Hourly Earnings For Major Labor Force Groups Tables 1-3 (Nov. 2, 1977). In contrast, the 1977 average weekly wage for male dominated jobs such as construction ($297), transportation and public utilities ($278), and motor vehicle retailers ($208) was far better. Women in Poverty at 19.

occupations where women are ghettoized, the few men employed receive higher wages.[39/]

The unequal opportunities open to poor men and women are evident from the experience under the federal Work Incentive Program ("WIN"),[40/] established to create job placement and training for welfare recipients. Summarizing hearing testimony on the WIN program, the U.S. Commission on Civil Rights reported:

39/ On the average, in 1977 women clerical workers had a median income of $5,365 less than male clerical workers; retail trade saleswoman earned $5,581 less than retail trade salesmen; and female food service workers earned $2,077 less than male food service workers. Id.

40/ 42 U.S.C.§630, et. seq. WIN is the only federal employment program specifically targeted at recipients of Aid to Families With Dependent Children (AFDC). About 75 percent of WIN registrants are women. Women in Poverty at 14.

> Officials of the WIN program who need to make immediate job placements for welfare recipients gave dramatic evidence of the difference in opportunities for women. Women who have no skills and a low educational level have to take jobs as assemblers or packers at minimum wage levels if they want to become employed at once. A man with equally little experience can get a general labor job that pays more.[41/]

The statistics bear this out. In 1976, women who obtained employment through WIN were paid an average hourly wage of $2.57; the average hourly wage for men was $3.50.[42/] Further, although 75 percent of WIN registrants are women, many of whom have sole or major responsibilities for their families, the program has a legislative priority for the placement of unemployed fathers.[43/]

41/ Women in Poverty at 19.

42/ The Urban Institute, Women and Family Policy: Women in Federal Employment Programs 16-17 (January 1979); see Women in Poverty at 14-15.

43/ 42. U.S.C.§633(a): see Women in Poverty at 2,14.

These statistics reflect the reality for poor women and their dismal prospects of escaping poverty. Those who do secure employment are likely to be locked into sex-segregated, low-paying jobs that in too many cases mean they remain in poverty and dependent on Medicaid for medical care. Thus, in 1977, close to 36 percent of all women over the age of fourteen in poverty were employed; 14 percent were employed full-time.[44/] Yet employment failed to extract these women from poverty and dependence on government-funded medical care.

Denying an indigent woman the means to have a medically necessary abortion may preclude employment during the length of a health-threatening pregnancy and during recovery. Her employment possibilities may even be permanently impaired by damage to her health as a result of pregnancy or the permanent burden of care for a child with birth or congenital defects.

44/ U.S. Dep't of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 116, Money, Income and Poverty Status of Families and Persons in U.S. 1977, Table 10, 16-17 (Advance Report) (July 1978).

Although discrimination against employed women who become pregnant has been rendered illegal by the Pregnancy Discrimination Act,[45/] the benefit of this amendment to Title VII is not reaped by women whose employers do not offer employee benefits such as health care coverage, sick leave and disability insurance. Title VII prohibits discrimination based on pregnancy; it does not require the creation of employee benefit plans.[46/] In 1975, less than 48 percent of all employees were covered by temporary disability insurance; health benefit plans for hospitalization covered only 72 percent of all employees; and regular medical coverage was available to less than 70 percent.[47/] Indigent women who are more likely to be employed part-time or in occupations such as private household worker, waitress or farm

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45/ Pregnancy Discrimination Act of 1978, Pub.L.No. 95-555, 42 U.S.C. §2000e(k).

46/ See Equal Employment Opportunity Comm'n (EEOC) Questions & Answers Concerning the Pregnancy Discrimination Act, 44 Fed. Reg. 23804-09 (1979) (to be appended to 29 C.F.R. Part 1604).

47/ U.S. Social Security Administration, 40 Social Security Bulletin 20,22 (Nov. 1977).

worker, are least likely to have access to these employee benefits, let alone a realistic and timely remedy to combat employment discrimination on the basis of pregnancy.[48/]

Should a woman's health be restored after a problem pregnancy, the lack of child care in our society poses a special problem. This problem confronts all parents who seek employment, but impacts especially hard on women, and particularly the 2,279,000 indigent women who head families.[49/] At times the responsibilities attending single parenthood preclude employment as a matter of explicit employer policy.[50/]

48/ Government remedies for sex discrimination in employment are illusory for many women in poverty who cannot afford financially to lose hard-gained employment nor practically the time to effect a challenge and remedy.

49/ U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1978 471 (September 1978).

50/ Since 1974, the Army's regulations have forbidden the enlistment of sole parents with custody of children under 18. Army Regulation 601-210.

Where employment is not precluded, parents must have some responsible child care arrangements while they are absent from the home. Yet, as the National Commission on the Observance of International Women's Year has found, "for most working parents, child care is makeshift, internal, unavailable or prohibitively expensive."[51/] Government agencies recognize that "there is still a great lag between the need and supply of good child care facilities, whether in a center or in a family home."[52/] In two-parent families, where the responsibility for care of children traditionally has been assigned to the mother,[53/] as well as in single parent families headed by women,

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51/ Nat'l Comm'n on the Observance of International Women's Year, The Spirit of Houston 27 (1978).

52/ Handbook on Women Workers at 40. In 1975 there were over 16 million children 3 to 13 years old with working mothers, but only 1.7% were enrolled in group care centers. U.S. Department of Labor, Working Mothers and Their Children 11 (1977).

53/ Women in Poverty at 30; Frug, "Securing Job Equality for Women: Labor Market Hostility to Working Mothers," 59 Boston University Law Review 55, 56-57 & n.16 (1979).

the lack of child care options circumscribes employment opportunities for women with children.[54/]

Approximately one-third of all employed mothers accommodate childrearing responsibilities and economic survival through part-time work.[55/] However, the flexibility for family duties that comes with part-time work is not without a price: part-time employment "requires workers...to sacrifice normal employment expectations in exchange for less time on the job."[56/] Thus, part-time work is dramatically underpaid in comparison with full-time employment; and it is characterized by inadequate fringe benefits, opportunities for promotion, job stability, or salary increases.[57/]

54/ See Women in Poverty at 30-45. Child care is a central concern for women in deciding whether to work, which hours and where.

55/ Frug, "Securing Job Equality for Women: Labor Market Hostility to Working Mothers," 59 Boston Rev., supra at 57.

56/ Id.

57/ Id.

Even where the multiple responsibilities of employment and childrearing have been accommodated, another pregnancy--particularly when health-threatening--may make the situation totally untenable. Where the woman is forced to leave the workforce, despite economic need, the interruption in her job development may result in long-term problems. In addition to the significant dampening effect on wages,[58/] the interruption of employment has a number of adverse consequences, including ineligibility for seniority and its concomitant job security and mobility opportunities,[59/] and reduced social security benefits.[60/]

58/ See Handbook on Women Workers at 125.

59/ Id.; cf. California Brewers Ass'n v. Bryant, 48 U.S.L.W. 4156 (1980).

60/ See U.S. Dep't of Health, Education and Welfare, Social Security and the Changing Roles of Men and Women, 10, 20-22 (February 1979).

For untold numbers of indigent women, the denial of funding for medically necessary abortions will compound their poverty[61] and exacerbate the impact of sex discrimination. Having control over reproduction will not erase the many burdens faced by the indigent woman confronting poverty and sex discrimination in the labor market. But by denying her the means to terminate a health-threatening pregnancy, the government has rendered illusory its efforts to combat these burdens.

61/ For pregnant teenagers, the denial of abortion may assure poverty and dependence on government aid. Seventy-two percent of the women who first gave birth at ages 15-17, and 41 percent of those who gave birth at 18 or 19, were receiving public assistance. Alan Guttmacher Institute, 11 Million Teenagers 26 (1976).

B. Indigent Women, The Victims of Restrictions on Medically Necessary Abortions and of Sex Discrimination In the Labor Force, Are Also Those Most Burdened By Sex Discrimination In Education and Job Training Programs.

Education and job training programs aimed at alleviating the employment problems of the poor are potentially among the most powerful tools available for improving the employment and economic status of women. Yet there is clear indication that sex bias persists in our educational institutions[62] and that job training programs replicate and reinforce the patterns of occupational segregation and wage differentials found in the labor market.[63]

Education and job training opportunities are not equally available to women, and

62/ See, e.g., American Friends Service Comm., Almost As Fairly (1977); Project on Equal Education Rights, Back-to-School Line-Up: Where Girls and Women Stand in Education Today (1979).

63/ See generally, Women in Poverty at 14-39.

particularly to poor women, despite legislative action[64/] to assure gender-based equality in education. Women have not yet achieved educational parity with men[65/] and consequently are robbed of the benefits education brings. The obstacles to women's educational attainment posed by childbearing and rearing responsibilities are reflected in school enrollment rates: during their childbearing years, enrollment rates for women fall below those of men.[66/]

Coerced childbearing has a particularly harsh and far reaching impact on the educational opportunities of teenagers. According to testimony received by the court below, "eight-tenths of the women who become

64/ See e.g., Title IX of the Educational Amendments of 1972, 20 U.S.C. §1681 et. seq.; Vocational Education Act as Amended in 1976, 20 U.S.C. §§2301, 2356.

65/ U.S. Comm'n on Civil Rights, Social Indicators of Equality for Minorities and Women 16 (1978).

66/ At age 16, school enrollment rates for women approximately equal those of men; in the 22 to 24 year bracket, their enrollment rate is only slightly over half that of comparably aged men, a differential that remains steady through the 30 to 34 year bracket. Handbook on Women Workers at 195.

mothers at seventeen or younger drop out of school, and alternative educational programs for such young mothers are provided by only about one-third of the states."[67/] Pregnancy is the reason most often cited by female teenagers for dropping out of school.[68/] Rather than providing emotional support and encouragement for the pregnant teenager to continue her education during pregnancy and return after the birth of her child, teachers and counselors still actively "encourage" pregnant teenagers and teenage mothers to leave school.[69/] The resulting low-level of educational attainment has a direct bearing upon employment and, therefore, economic independence.[70/]

Those females who do not drop out are generally "encouraged by the schools to prepare solely for the role of homemaker or for dead-end low-paying jobs in traditionally

67/ McRae v. Harris, slip op. at 147.

68/ Alan Guttmacher Institute, 11 Million Teenagers 25 (1976).

69/ Id.; see also McRae v. Harris, slip op. at 147.

70/ See New York State Department of Social Services, Teenage Pregnancy in New York State: A Report to Governor Hugh L. Carey 4 (July 1978).

female occupations."[71/] The vocational education system presents dramatic evidence of the way education channels women into low-status, low-paying jobs. While 55 percent of the vocational education enrollees in 1972 were girls and women, less than 2% of those enrollees were being trained for other than traditional female occupations.[72/]

Apprenticeship programs are an important potential source of training for employment, particularly those aimed at aiding the disadvantaged achieve economic independence. Historically, women did not even apply to such programs because sex-biased high school curricula did not encourage girls to think

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71/ Steiger, "Vocational Preparation for Women: A Critical Analysis" reprinted in Sex Discrimination and Sex Stereotyping in Vocational Education: Hearings Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 35 (1975) [hereinafter Hearings]; see Steele, Women in Vocational Education, reprinted in Hearings 285-337.

72/ Handbook on Women Workers at 214-15. Over 49% of the females enrolled in vocational education courses in 1972 were studying home economics. The rest were concentrated in training and education aimed at traditionally female, low-paying occupations such as clerical, retail sales, cosmetology, and health aids. Id.

of careers in skilled crafts.[73/] When they applied, they often were not accepted.[74/] Although women are now applying to apprenticeship programs in increasing numbers, their participation rate is still appallingly low.[75/]

Since women represent three-fourths of all persons receiving public assistance and welfare payments,[76/] government training programs aimed at helping the poor should have a significant positive impact on women. The reality is otherwise -- men receive

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73/ Women in Poverty at 21.

74/ Id.

75/ Women were only 2.2 percent of the participants in apprenticeship programs overseen by the United States Department of Labor in 1977. The Coming Decade: American Women and Human Resources Policies and Programs, 1979: Examination of Conditions and Opportunities Confronting American Women in Our Nation's Workplace: Hearings Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 861 (1979) (testimony of Robert J. McConnon, Administrator, Bureau of Apprenticeship and Training, Employment and Training Administration, U.S. Dep't of Labor).

76/ Women in Poverty at 1.

preferred placement in the programs[77/] and women are consistently underrepresented.[78/]

One major federal job training and employment program, The Comprehensive Education and Training Program (CETA),[79/] has been described as potentially an "important means for bringing women into the labor force on an equal basis with men."[80/] Unfortunately, the indications are that CETA

77/ See p. 48 supra., discussing the federal Work Incentive Program. Although the current emphasis of WIN is on immediate job placement, it was initially established to promote job training and counselling as well. Women in Poverty at 14.

78/ While women comprised 46 percent of the unemployed population in the 1970's, only 43 percent of those in federal employment and training programs were women. This figure, however, is inflated by the high percentage of women receiving AFDC benefits who are required to register for WIN. The Urban Institute, Women and Family Policy: Women in Federal Employment Programs (1979).

79/ 29 U.S.C. §801 et. seq.

80/ New York City Comm'n on the Status of Women, Women, Work and CETA (remarks of Alexis M. Herman, Director, Women's Bureau, U.S. Dep't of Labor) 10 (1977).

is not serving the interests of women effectively.[81/] For example, in 1976 women represented only 28 percent of those enrolled in CETA's Title IV Jobs Corps projects, 32 percent in Title II, and 35 percent in Title VI programs.[82/] A recent survey of the 445 prime sponsors in CETA revealed only 82 projects targeted for women.[83/] Many of the women who do receive placements in CETA are trained in programs that follow the sex-segregated patterns found in the work force at large.[84/] These programs are not helping women learn the job skills needed to break out of the traditionally low-paying jobs females usually occupy in our society. Even in jobs obtained through CETA, women are likely to

81/ Id.

82/ The Urban Institute, Women and Family Policy: Women in Federal Employment Programs, supra, at 9.

83/ New York City Comm'n on the Status of Women, Women, Work and CETA, supra, at 10-11 (remarks of Alexis M. Herman, Director, Women's Bureau, U.S. Dep't of Labor). Of these, 30 projects were funded from the Secretary of Labor's Title III Discretionary Monies, a one-time only bonus grant program.

84/ Id. at 26 (based on a New York City survey).

receive lower wages than men doing the same job.[85/]

Even the military, traditionally viewed as a route out of poverty and currently advertised as a means of gaining valuable work experience and training, provides little opportunity for women. In 1977, women constituted only 5.8 percent of the armed forces on active duty.[86/] As in the general labor force, these women were concentrated in traditionally female occupations.[87/] Furthermore, less than 27 percent

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85/ Fifty percent of all women who obtain jobs through the CETA Public Service Component are placed in clerical positions; they receive 57 cents less per hour than men employed through CETA in clerical positions. The Coming Decade: American Women and Human Resources Policies and Programs, 1979: Examination of Conditions and Opportunities Confronting American Women in Our Nation's Workplace: Hearings Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 730 (testimony of Hon. Mary F. Berry, Asst. Sec'y of Education, U.S. Dep't of Health, Education and Welfare) (1979).

86/ U.S. Dep't of Defense, America's Volunteers: A Report on the All-Volunteer Armed Forces 71 (1978).

87/ For example, 33 percent were in clerical and administrative positions and less than 2 percent were in electrical/mechanical repair jobs. Id.

of all 1977 authorized positions in the military were open to female enlistees.[88/] Yet another serious obstacle to women in the armed forces is the requirement in some branches that single parents forfeit custody of their children as a precondition to enlistment.[89/] The effect of the pervasive sex-bias in the military is to deprive women of the training and experience that would help them obtain skilled jobs in the civilian work force,[90/] and to perpetuate their confinement to low-paying, low-skilled occupations.

88/ See U.S. Dep't of Defense, Use of Women in the Military 32,38,41,44 (2d. ed. 1978) (from data submitted by the Army, Navy, Air Force and Marines on positions authorized for "End FY 1977").

89/ See Army Regulation 601-210. The impact of this requirement is most devastating on women because of the significantly larger number of women as compared to men with custody of their children. See U.S. Dep't of Commerce, Bureau of the Census, Divorce, Child Custody and Child Support Table 6, p. 11 (June 1979) (showing over five million single parent families maintained by females in 1978, compared to less than 550,000 maintained by males).

90/ See Owens v. Brown, 455 F.Supp. 291,295 (D.D.C. 1978).

The lack of realistic child care options that plagues women in the employment context also disadvantages women seeking to escape poverty through education and job training. Indeed, the obstacles may be even greater here, for unlike gainful employment, studying produces no immediate income. Welfare departments may refuse to grant recipients the child care allotments necessary to permit them to study.[91/] And it is uncertain whether schools will be held to have any obligation to provide child care facilities for the children of students.[92/]

91/ See, e.g., Budzinski v. Commonwealth of Pennsylvania, Dep't of Public Welfare, No. 2349 C.D. [1977] 2 Pov. L. Rep. (CCH) ¶27,412 (Pa. Commonwealth Ct. 1978) (denying eligibility for a child care allowance to an AFDC recipient taking a training course in mathematics, where she had already completed an approved course in stenography).

92/ See De LaCruz v. Tormey, 582 F.2d 45 (9th Cir. 1978), cert. denied, 99 S.Ct. 2416 (1979) (finding plaintiffs alleging lack of day care facilities at a community college state a cause of action under both Title IX and the Fourteenth Amendment, but failing to reach the merits).

The pervasive sex discrimination in education and job training programs, particularly those specifically aimed at helping the poor achieve economic independence, serves to reinforce the indigent woman's poverty. This condition deepens when she is denied basic control over her reproductive health and life. Deprived of the ability to determine and plan the size of her family and to obtain necessary health care, she is virtually assured that education and job training opportunities -- theoretically available to all without gender bias, but in reality already limited for women -- will be closed to her.

III

THE CHALLENGED STATUTE DOES NOT WITHSTAND CONSTITUTIONAL SCRUTINY.

A. Strict Scrutiny Is Required Where, As Here, the Denial of Medicaid Funding for Medically Necessary Abortions Impermissibly Inhibits and Penalizes the Indigent Woman Who Chooses to Exercise Her Constitutionally Protected Right to Terminate Her Pregnancy.

Several interrelated factors require the Court to subject to critical examination the challenged statutory classification prohibiting funding for medically necessary abortions. First, as discussed above in Part IA, this measure intentionally singles out one class of individuals--indigent women in need of medically necessary abortions--and deprives only this class of the means to obtain necessary health care. The challenged classification invidiously discriminates against these indigent women by seeking to inflict health damage on those choosing to exercise their constitutionally protected right to terminate their pregnancy by abortion.

Second, as shown in Part IB, the denial of medical care for health-threatening pregnancies impermissibly interferes with an indigent woman's fundamental right to privacy in decisions concerning reproductive and family matters.

Third, as shown in Part IC, this restrictive funding measure deprives women of the constitutionally recognized liberty to make a conscientious decision to terminate a pregnancy for medical reasons. McRae v. Harris, slip op. at 327-28.

Finally, the funding measure impacts upon a class of individuals that is starkly defined: it is 100% female and 100% poor. The Hyde Amendment denies access to necessary health care to women for whom dependency on Medicaid is a brutal fact of life. In doing this, it heaps additional burdens on indigent women already denied equal access to education, job training and employment opportunities, as discussed above in Part II. The government's classification in Hyde imposes this harsh treatment upon those without the power to have their voices heard by a legislature dominated by men who are

not themselves dependent on government health care programs.[93/] See Reproductive Health Services v. Freeman, slip op. at 29-30.

Taken singly, each of these factors is sufficient to compel critical review by the Court. Taken together, such deliberate governmental intrusion into the constitutionally protected realm of the woman's private conscientious decision to terminate her pregnancy, coupled with the detrimental health consequences central to this case, requires a strict standard of constitutional review. See, e.g., Carey v. Population Services International, 431 U.S.678,686 (1977); Roe v. Wade, 410 U.S.113,154 (1973).

93/ The discrimination against women in the political arena, noted by the Court in Frontiero v. Richardson, 411 U.S.677,686 n.17 (1973), persists. See, e.g., Johnson and Carroll, Profile of Women Holding Office II 4A-7A (Eagleton Institute of Politics 1978); Nat'l Comm'n on the Observance of International Women's Year, The Spirit of Houston 38-41 (1978).

B. Serving No Legitimate Interest Whatsoever, the Challenged Restriction on Medicaid Funding of Medically Necessary Abortions Fails Both the Strict Scrutiny and Minimum Rationality Tests.

To survive constitutional review, strict scrutiny of the Hyde Amendment's classification requires that it further a compelling state interest. Not only does it fail to satisfy such a standard, Hyde falls short even when measured by the more minimal rationality test.

The Hyde classification treats indigent pregnant women for whom an abortion is medically necessary differently from Medicaid recipients who seek other medically necessary services. It also treats most indigent women in need of medically necessary abortions differently from women who decide to continue their pregnancies to term. In both cases, the funding restriction penalizes the woman with a health-threatening pregnancy who exercises her constitutional right to decide to terminate her pregnancy.

No compelling state interest exists to defend this classification. The government cannot justify the funding prohibition on fiscal grounds. Not only did the Court reject this argument in both Shapiro v. Thompson, 394 U.S.618,633 (1969), and Memorial Hospital v. Maricopa County, 415 U.S.250,263 (1974), but any saving from restricting Medicaid funds for therapeutic abortions is illusory. Costs of maternal care and delivery will far exceed the amount spent on medically necessary abortions.[94/] The government also will be called upon to pay the medical costs of indigent women who, as a result of continuing the pregnancy, suffer short- and long-term health damage, as well as medical costs necessary for the care of any children born with birth or congenital defects.[95/] As Justice Stevens noted in denying a stay in Williams v. Zbaraz, 99 S.Ct.2095,2098 (1979):

94/ Zbaraz v. Quern, 469 F.Supp.1212,1218 (N.D.Ill. 1979), prob. juris. noted, November 27, 1979; cf. Maher v. Roe, 432 U.S. 464,478-79 (1977).

95/ See Alan Guttmacher Institute, Abortions and The Poor: Private Morality, Public Responsibility, 32 (1979).

> Both the findings of the District Court and the record before me compellingly demonstrate that it is less expensive for the State to pay the entire cost of abortion than it is for it to pay only its share of the costs associated with a full-term pregnancy.

Nor does the challenged funding restriction protect maternal health. Hyde's effect is exactly the opposite.[96/] Indigent pregnant women seeking therapeutic abortions clearly suffer injury.

The only other interest these restrictions arguably promote is the protection of potential life. However, although Roe v. Wade, and its progeny establish that the state's interest in protecting the fetus becomes "compelling" after viability, this interest is at no time great enough to "outweigh the woman's interest in her health." Williams v. Zbaraz, 99 S.Ct. at 2098. The Court has made clear that concern for the woman's health is

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96/ See Part IA, supra, for a discussion of the Hyde Amendment's impact on maternal health.

paramount throughout the pregnancy and that it is impermissible for the state to interfere with this health interest even to promote fetal life. See Colautti v. Franklin, 439 U.S.379, 398-400 (1979); Roe v. Wade, 410 U.S.113 164 (1973); cf. Planned Parenthood of Missouri v. Danforth, 428 U,S. 52 (1976). Women seeking medically necessary abortions, by definition, are in health- or life-endangering circumstances. By denying funds for medically necessary abortions, the Hyde Amendment effectively ignores the woman's health, thereby attempting to achieve by legislative fiat that which this Court has consistently ruled impermissible.

Nor is Maher v. Roe, 432 U.S.464 (1977), to the contrary. While Maher approves a policy decision to encourage normal childbirth and not require funding for non-therapeutic abortions, its rationale cannot support a provision denying funding for therapeutic abortions. Women who seek medically necessary abortion procedures do so because they face something other than "normal childbirth."

Promoting childbirth, irrespective of how abnormal or traumatic the pregnancy, over the woman's health was not the result envisioned by Maher. The determination of statutory rationality in that case was premised entirely on the fact that protecting the fetus would lead to normal childbirth. 432 U.S. at 478-79.

It is evident, then, that the Hyde Amendment serves no legitimate state interest, let alone a compelling one. For this reason, it fails both the strict scrutiny and the raional basis test. By any standard, the challenged Medicaid restriction cannot survive constitutional review.

CONCLUSION

For the reasons stated above, amici respectfully submit that the judgment and order of the District Court for the Eastern District of New York should be affirmed.

Respectfully submitted,

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